Supreme Court, U.S.
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No. 96-1493

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARDITH CAVALLO,
Petitioner,

v.

STAR ENTERPRISE, TEXACO REFINING AND MARKETING (EAST) INC. AND SAUDI REFINING, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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24 pp

QUESTION PRESENTED

Petitioner purports to present for review the question of whether the Fourth Circuit used the proper standard in reviewing the District Court's exclusion of Petitioner's proposed experts on medical causation for failure to meet the standards of admissibility set forth in the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That question is not properly presented by either the Petition or the record below.

The Petition itself does not present any *Daubert* issue. The Petition alleges that Petitioner was diagnosed with Reactive Airways Dysfunction Syndrome ("RADS"). Petitioner's expert did not offer this opinion until after the District Court had already excluded his previous, different opinion and granted summary judgment for Respondents, at which point Petitioner moved for reconsideration and for the first time presented the new opinion on RADS. The District Court properly denied the motion for reconsideration. It did not, however, apply any *Daubert* analysis to the RADS opinion.

The Question Presented in this case is therefore the following:

Did the District Court abuse its discretion in denying Petitioner's motion for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure, where Petitioner sought for the first time to offer an opinion that Petitioner had Reactive Airways Dysfunction Syndrome eight days after the District Court granted summary judgment for Respondents?

RULE 29.6 STATEMENT

Respondent Texaco Refining and Marketing (East) Inc. is a wholly-owned subsidiary of a wholly-owned subsidiary of a wholly-owned subsidiary of Texaco Inc., which is a publicly held corporation. Respondent Star Enterprise is a joint venture of respondents Texaco Refining and Marketing (East) Inc. and Saudi Refining, Inc.

In this brief, respondents Star Enterprise, Texaco Refining and Marketing (East) Inc. and Saudi Refining, Inc. will be referred to collectively as "Star."

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

Contrary to what Petitioner states in her petition, the issue she presents to this Court does not involve the standard of review that Courts of Appeals should apply to district court decisions that exclude expert testimony under *Daubert*. Petitioner challenges the exclusion of an expert opinion that she had Reactive Airways Dysfunction Syndrome ("RADS"), which is the only opinion Petitioner presents in her petition to this Court. The District Court did not exclude that opinion under *Daubert*.

Petitioner failed to explain to this Court that her experts initially opined in the District Court that she suffered from conditions other than RADS, and that these other conditions were due to causes for which Star was allegedly responsible. The District Court excluded these other opinions under *Daubert* and entered summary judgment for Star. Later, Petitioner moved for reconsideration and only then offered for the first time the new expert opinion that she had RADS. The District Court denied the motion for reconsideration as untimely. The District Court never evaluated the admissibility of the RADS opinion under *Daubert*, and the Fourth Circuit never reviewed the District Court's exclusion of that opinion.

STATEMENT

A. Factual Background

In December 1991, during the course of a pipeline shipment from a petroleum distribution terminal in Fairfax, Virginia, aviation jet fuel or "AvJet" was accidentally spilled on the terminal property. (Pet. App. 27.) As the District Court acknowledged, AvJet is similar to common kerosere. (Pet. App. 30, 46, 47, 52 and 61.) Petitioner alleged that Star was responsible for the spill.

Petitioner contends that she was walking with her husband through a shopping mall parking lot near the terminal at the time of the AvJet spill, which occurred around midnight. (Pet. App. 26.) Petitioner presented testimony of an air-modeler who opined that the maximum "worst case" concentration of AvJet or kerosene vapors from the spill in the area of the parking lot was 61 mg/m^3. (Pet. App. 27.) Thus,

Petitioner alleged that she was exposed to AvJet vapors at a concentration of 61 mg/m^3 for a period of five to thirty minutes while walking through a parking lot. (Pet. App. 26, 42.) Although there is evidence that Petitioner was not in the parking lot at the time of the spill, Star accepted Petitioner's allegation of exposure for purposes of summary judgment proceedings in the District Court.

Petitioner claimed that her alleged brief exposure to a low level of AvJet vapors caused her to develop chronic conjunctivitis, sinusitis and obstructive pulmonary disease. (Pet. App. 29.) In an effort to prove that alleged exposure to AvJet vapors was the medical cause of her claimed injuries, Petitioner proffered the opinions of two proposed experts: Dr. David Monroe, a toxicologist, and Dr. Joseph A. Bellanti, a physician. Dr. Monroe opined that Petitioner suffered from "a variety of irritant effects from exposure to petroleum hydrocarbon vapors from the Fairfax Terminal site." (Pet. App. 38.) Dr. Bellanti prepared a report which stated that Petitioner had "chronic sphenoid sinusitis" and "pulmonary dysfunction." (Pet. App. 54.)

As the District Court noted, Dr. Monroe and Star's toxicology expert, Dr. Joseph Rodericks, agreed on the proper methodology that a toxicologist should follow in determining whether exposure to certain substances could cause a particular adverse effect. (Pet. App. 42.) Petitioner summarized the methodology in a submission to the District Court in which she noted that Star's expert had accurately described the proper methodology:

> The methodology of a toxicologist is explained by Dr. Joseph Rodericks, defendants' own toxicologist, and confirmed in his own report in this case. He writes that a toxicologist relies on certain scientific principles and uses particular scientific methods in forming his opinion on whether exposure to certain chemicals can adversely affect the health of an individual. ([Rodericks] Report at 2.) . . . The scientific methodology begins when the toxicologist evaluates the chemicals and the concentrations of chemicals to which the individual was exposed. He then consults the published scientific literature and determines the level of exposure necessary to produce the particular adverse effects associated with those chemicals. Finally, the toxicologist estimates the likelihood that such an exposure to any or all of these chemicals could produce the symptoms from which the individual suffers. ([Rodericks] Report at 2-3.)

(Plaintiff's Opposition to Motion in Limine at 9-10.)

Dr. Rodericks explained that this "dose-response" methodology has been endorsed by the World Health Organization, the National Academy of Sciences, the U.S. Environmental Protection Agency and the U.S. Food and Drug Administration. (Pet. App. 41.) The District Court correctly described both the "dose-response relationship" and the critical part it plays in the toxicologist's evaluation of causation:

> As Dr. Rodericks explains, all chemicals can cause health problems at some level or concentration of exposure, but they vary widely in the types of harm caused and in the levels of exposure required to trigger those harms. In addition, all chemicals have thresholds of exposure that must be exceeded before the harms will occur, and these thresholds may be identified through scientific studies and literature. The task of the toxicologist, therefore, is to identify a dose-response relationship for a particular chemical (or chemical mixture) and illness and analyze the results to determine whether the duration and concentration of exposure in a given instance could have caused the alleged harms.

(Pet. App. 41-42.)

Despite the agreement on the proper methodology, neither of Petitioner's experts adhered to that methodology.

Dr. Monroe opined that Petitioner became "sensitized" to petroleum hydrocarbons as a result of her alleged exposure to AvJet vapors. He opined that the alleged exposure caused her to sustain chronic conjunctivitis and sinusitis (Petitioner and her other expert alleged that she sustained chronic obstructive pulmonary disease also, but Dr. Monroe stated that he could not opine that the pulmonary condition was caused by the alleged exposure). (Pet. App. 29.) Dr. Monroe's report and deposition testimony revealed that he failed to follow the proper scientific methodology for reaching an opinion on causation, and that his opinion lacked scientific support: he failed to

consider the dose-response relationship that is critical to a valid toxicological opinion; he did not know whether the particular exposure alleged in this case was sufficient to cause any adverse effect, let alone the specific conditions that Petitioner alleged; he admitted that he did not even know what threshold level of exposure to AvJet vapors would be necessary to trigger any adverse reaction; he could not find any scientific studies or literature to show any connection between AvJet and the conditions Petitioner alleged; and the only studies he could identify that he said supported his opinion did not concern AvJet, nor did they concern the sort of chronic conditions Petitioner alleged. (Pet. App. 42-54.)

Dr. Bellanti is not a toxicologist, but as the District Court correctly noted, "he must nonetheless apply the principles and methods of toxicology if he is to give an opinion on an issue relating to that specialty." (Pet. App. 59, citing *Wade-Greaux v. Whitehall Laboratories, Inc.*, 874 F. Supp. 1441, 1481 (D.V.I.), *aff'd*, 46 F.3d 1120 (3d Cir. 1994).)

Dr. Bellanti submitted a report stating that Petitioner suffered from "chronic sphenoid sinusitis" and "pulmonary dysfunction." (Pet. App. 54-55.) He admitted during his deposition, however, that he could not opine that these illnesses were caused by vapors from the AvJet spill. Moreover, like Dr. Monroe's deposition testimony, Dr. Bellanti's testimony showed that he failed to follow the proper scientific methodology for reaching an opinion on causation, and that his opinion lacked scientific support: he admitted that he did not know the intensity or duration of the alleged exposure; he admitted that knowing the

threshold level of exposure necessary to cause injury was essential, but he did not know the threshold level of AvJet vapors necessary to cause injury; and he admitted that he had not found any scientific studies or literature to support a causal relationship between Petitioner's alleged injuries and the claimed exposure to AvJet vapors. (Pet. App. 59-63.)

B. Proceedings Below

Petitioner filed her Complaint in the District Court in November 1994. (Pet. App. 70.) Star moved to dismiss in December 1994. In January 1995, the District Court granted the motion to dismiss Counts II, III and IV, but denied the motion on Count I, which asserted Petitioner's claim for personal injuries allegedly caused by the AvJet spill. (Pet. App. 69-73.)

The parties engaged in extensive discovery. In May 1995, Star moved in limine to exclude Petitioner's putative experts on medical causation, and also moved for summary judgment. After briefing by all parties and a hearing on the motions, the District Court granted Star's motion in limine and the motion for summary judgment. (Pet. App. 66.) The District Court excluded the testimony of Petitioner's proffered experts and held that Star was entitled to summary judgment on her claim for alleged chronic injuries. The District Court noted that the parties agreed on the proper scientific methodology the experts were required to follow, but it held that the expert testimony Petitioner proffered on causation was inadmissible because her experts did not follow the proper scientific methodology in forming their opinions. (Pet. App. 63.)

The District Court invited Petitioner to move for reconsideration if she believed she had pled and could prove a claim for "immediate and temporary effects of irritated eyes and runny nose on the night of the [AvJet] spill." (Pet. App. 65.) Petitioner moved for reconsideration, but she did not assert a claim for "immediate and temporary effects." Instead, she submitted with her motion a new affidavit from Dr. Bellanti, which stated that he had performed additional medical tests on Petitioner after the motions in limine and for summary judgment were granted, and he offered for the first time a new "diagnosis" that all of Petitioner's ailments constitute a condition not previously alleged, known as RADS. (Court of Appeals App. 1812-1816.) The District Court denied the motion for reconsideration, and allowed Petitioner an additional 10 days to move again if she chose to assert a claim for immediate effects of the AvJet spill, if any. (Pet. App. 76-78.) Petitioner did not move for reconsideration again.

Petitioner appealed to the Fourth Circuit arguing that the District Court erred in dismissing Counts II, III and IV, erred in excluding the expert testimony, and erred in granting summary judgment in favor of Star on Count I. The Fourth Circuit affirmed the District Court's decision to exclude the expert testimony and to grant summary judgment on Petitioner's claim for personal injuries due to her alleged exposure to AvJet vapors. Specifically, the Fourth Circuit found that the District Court did not abuse its discretion in excluding the expert testimony.

MISSTATEMENT IN THE PETITION

In accordance with Supreme Court Rule 15.1, Star points out the following misstatement of fact in the Petition that bears on what issues properly would be before the Court if certiorari were granted.

On pages 2-3, the Petition states: "Ultimately, [Petitioner] was diagnosed with Reactive Airways Disfunction [sic] Syndrome ('RADS'), a medically recognized condition which creates a heightened sensitivity to chemicals, and which is caused by an initial 'insult' or exposure to high concentrations of chemicals, such as those in petroleum products." As noted, however, Petitioner was not diagnosed with RADS until after the District Court excluded the expert opinions Petitioner proffered and granted summary judgment in favor of Star. It was not until Petitioner moved for reconsideration of the orders excluding the testimony of her experts and granting summary judgment that she advanced this new "diagnosis." The District Court properly denied the motion for reconsideration without determining whether the new "diagnosis" would have been admissible under *Daubert* if it had been presented timely. (Pet. App. 76-78.)

The Petition indicates that the Fourth Circuit applied an abuse of discretion standard to a ruling under *Daubert* that excluded an opinion that the Petitioner had RADS. That is not so. The testimony that the District Court excluded under *Daubert* consisted of the opinions that the alleged exposure to AvJet vapors caused Petitioner to suffer sinusitis, conjunctivitis and pulmonary disease -- opinions that Petitioner does not advance in this Court. Her brief to

the Fourth Circuit challenged the District Court's application of *Daubert* to her experts' opinions, and not its refusal to grant the motion for reconsideration that presented the RADS diagnosis. Consequently, neither the District Court nor the Fourth Circuit ever had cause to apply *Daubert* to the "diagnosis" of RADS.

REASONS FOR DENYING THE WRIT

I. THE ISSUE ON WHICH PETITIONER SEEKS REVIEW WAS NOT PRESENTED TO OR RULED UPON BY THE FOURTH CIRCUIT

The Petition states that "[u]ltimately, [Petitioner] was diagnosed with Reactive Airways Disfunction [sic] Syndrome ('RADS'), a medically recognized condition which creates a heightened sensitivity to chemicals, and which is caused by an initial 'insult' or exposure to high concentrations of chemicals, such as those in petroleum products." (Petition at p. 2-3.) This is the only medical or toxicological opinion mentioned in the Petition.

As explained earlier, this opinion was submitted to the District Court for the first time as part of Petitioner's motion for reconsideration, filed eight days after the District Court granted summary judgment for Star. Petitioner had previously claimed, and her experts had testified, that her alleged exposure to AvJet vapors caused her to develop different conditions, which Petitioner does not so much as mention in her Petition in this Court: chronic conjunctivitis, sinusitis and pulmonary disease.

The District Court had no cause even to consider the new opinion on RADS presented in the motion for reconsideration. New evidence that a moving party produces in support of a motion for reconsideration under Rule 59(e) must necessarily be evidence that the party could not have obtained prior to the entry of judgment. *See RGI, Inc. v. Unified Indus.*, 963 F.2d 658, 662 (4th Cir. 1992); *see also French v. King*, No. 93-1504, 1993 U.S. App. LEXIS 33537, at * 5-* 6 (4th Cir. Dec. 23, 1993). The District Court correctly denied the motion.

Moreover, Petitioner did not argue in her brief submitted to the Fourth Circuit that the District Court was wrong in denying the motion for reconsideration. She merely argued, as she asserts in the Petition, that she was diagnosed as suffering from RADS and that the District Court improperly excluded her experts' opinions on medical causation.

The Petition in this Court is at best inaccurate. Petitioner argues that the Fourth Circuit applied an improper standard of review in affirming the exclusion of the opinion that she suffers from RADS. She contends that the Fourth Circuit reviewed the exclusion of that opinion under the abuse of discretion standard, and that a different standard should apply to the exclusion of expert testimony under *Daubert*. As explained already, however, the District Court did not exclude under *Daubert* the opinion that Petitioner suffers from RADS, nor did the Fourth Circuit consider whether the RADS opinion was properly excluded under *Daubert*. There is therefore no basis for this Court to grant certiorari to consider the question Petitioner presents, as that question was not presented or decided below.

To the extent the courts below rejected the opinion that Petitioner suffered RADS, they did so because that opinion was presented in a motion for reconsideration that the District Court denied. There is no doubt that the proper standard of appellate review of the denial of a motion for reconsideration is the abuse of discretion standard.[1] Petitioner does not contend otherwise. Thus, contrary to the Question Presented in the petition, this case does not present a justiciable controversy over the proper standard of appellate review.

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1 *See United States v. Roberts*, 978 F.2d 17, 20 n. 5 (1st Cir. 1992) (denial of a motion for reconsideration is reviewable for abuse of discretion); *Kotlicky v. United States Fidelity & Guar. Co.*, 817 F.2d 6, 8 (2d Cir. 1987) (same); *Kiewit E. Co. v. L&R Constr. Co.*, 44 F.3d 1194, 1204 (3d Cir. 1995) (same); *Transportation, Inc. v. Mayflower Servs., Inc.*, 769 F.2d 952, 954 (4th Cir. 1985) (same); *Weems v. McCloud*, 619 F.2d 1081, 1098 (5th Cir. 1980) (same); *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 123 (6th Cir. 1982) (same); *Billups v. Methodist Hosp.*, 922 F.2d 1300, 1305 (7th Cir. 1991) (same); *Roudybush v. Zabel*, 813 F.2d 173, 178 (8th Cir. 1987) (same); *Walker v. Bank of Am.*, 268 F.2d 16, 25 (9th Cir.), *cert. denied*, 361 U.S. 903 (1959) (same); *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1524 (10th Cir. 1992) (same); *Gonzales v. Garner Food Servs., Inc.*, 89 F.3d 1523, 1525 (11th Cir. 1996), *petition for cert. filed* (Mar. 12, 1997) (same); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (same).

II. UNDER ANY STANDARD OF REVIEW, PETITIONER'S PROPOSED EXPERT TESTIMONY WAS PROPERLY EXCLUDED

The Petition presents the single question of "[w]hether in reviewing the district court's application of [*Daubert*] to exclude expert scientific testimony, the Fourth Circuit erroneously applied the . . . abuse of discretion standard of review." (Petition at I.) In this case, the Court need not consider whether the abuse of discretion standard is appropriate. Regardless of what standard of review should apply to decisions excluding expert testimony under *Daubert*, the District Court's decision to exclude the expert testimony in this case was properly affirmed.

Where, as here, undisputed evidence shows that the experts failed to follow the scientific methodology that all parties agree is the proper methodology, the experts' opinions must be excluded and the exclusion must be affirmed under any standard of review. *Cf. In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (*"any* step that renders the analysis unreliable under the *Daubert factors renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology"*; emphasis in original), *cert. denied*, 115 S. Ct. 1253 (1995).

Star submits that abuse of discretion is the proper standard for *Daubert* rulings. Regardless, since the rulings in this case were correct under any standard, the Court should not grant certiorari in this case to consider what the appropriate standard of review should be.

III. THIS CASE IS NOT SIMILAR TO *JOINER V. GENERAL ELECTRIC CO.*

Petitioner contends that this case presents the same question that is presented in a case in which the Court recently granted certiorari, *Joiner v. General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, No. 96-188 (Mar. 17, 1997). Petitioner urges that the Court consolidate this case with *Joiner* or hold this case pending disposition of *Joiner*. Star disagrees and respectfully requests that the Court deny certiorari in this case, which is distinctly different from *Joiner*.

The *Joiner* case presented the question of what appellate standard of review should apply to decisions excluding expert testimony under *Daubert*. For all the reasons explained already in this brief, this case does not properly present that question. The testimony that Petitioner contends was improperly excluded in this case, namely the RADS diagnosis, was not excluded under *Daubert*. Thus, the question presented in *Joiner* about the review of *Daubert* decisions is wholly distinct from the real question presented in this case, which is simply whether the Fourth Circuit erred in affirming the denial of Petitioner's motion for reconsideration that included the RADS diagnosis.

Moreover, even if this case properly presented the question of whether the Fourth Circuit applied the correct standard to the rulings excluding testimony under *Daubert*, this case is sufficiently different from *Joiner* that it should not be consolidated with *Joiner* or held pending the disposition of that case. In *Joiner*, the Eleventh Circuit applied a more stringent standard of

review to *Daubert* decisions than the abuse of discretion standard that ordinarily applies to evidentiary rulings, and it reversed a decision to exclude evidence under *Daubert* pursuant to the unusually strict standard. By contrast, the Fourth Circuit in this case affirmed a ruling under *Daubert* applying the ordinary abuse of discretion standard. For these and many other reasons, the differences between this case and *Joiner* far exceed any similarities.

IV. THE FOURTH CIRCUIT APPLIED THE CORRECT STANDARD OF REVIEW

As the Petition points out, this Court held thirty-five years ago that the Courts of Appeals are to use an abuse of discretion standard to review the admission or exclusion of expert testimony. *Salem v. United States Lines Co.*, 370 U.S. 31 (1962). The Fourth Circuit is part of the overwhelming majority of Courts of Appeal that have followed this Court's ruling in *Salem* and have accorded deference to the district courts in their evidentiary rulings on expert testimony. *See, e.g., United States v. Shay*, 57 F.3d 126, 132 (1st Cir. 1995); *United States v. Daccarett*, 6 F.3d 37, 58 (2d Cir. 1993), *cert. denied*, 510 U.S. 1191 and 114 S. Ct. 1538 (1994); *Rosado v. Deters*, 5 F.3d 119, 124 (5th Cir. 1993); *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 137 (6th Cir. 1995); *Bradley v. Brown*, 42 F.3d 434, 436-37 (7th Cir. 1994); *Gier v. Educational Serv. Unit No. 6*, 66 F.3d 940, 944 (8th Cir. 1995); *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 597 (9th Cir. 1996); *United States v. Davis*, 40 F.3d 1069, 1073 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1387 and 1806 (1995).

Decisions on the admissibility of expert testimony should be subjected to a deferential standard such as the abuse of discretion standard for a host of reasons, including the following:

- A district court is in a better position than an appellate court to determine the reliability of an expert's opinion, as required by *Daubert*, and thus a district court ruling on the admissibility of such an opinion is entitled to deference.

- Rulings on the admissibility of expert opinions frequently require a thorough review of scientific literature to determine whether the opinions have a basis in science. If courts of appeals were required to repeat that sort of review whenever a party appeals from such a ruling, it would add an undue burden to the appellate process.

- Rulings on the admissibility of expert opinions are only occasionally outcome dispositive. To the extent that such rulings affect merely the quantum of evidence admitted, the rulings do warrant a particularly stringent review on appeal.

- The abuse of discretion standard has applied to rulings on the admissibility of expert testimony for many years. There is no cause to change this time-tested standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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